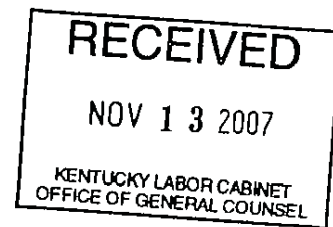


Steve N. Siegel  
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November 12, 2007



**Via FedEx Overnight Delivery**

Kembra Sexton Taylor, Esq.  
Assistant General Counsel  
Labor Legal Division  
Environmental and Public Protection Cabinet  
1047 U.S. 127 South, Suite 4  
Frankfort, KY 40601

**Re: KOSHRC Docket No. 4385-06**

Dear Ms. Taylor:

The purpose of this letter is three-fold. First and more importantly, our client, Bluegrass Cellular ("Bluegrass"), urges your client to immediately withdraw the citations at issue in this matter, and urges you to immediately dismiss the resultant complaint against Bluegrass. Second, we are renewing our request for copies of all the taped interviews with Tower Services' employees that were recorded by compliance officer Randy Gray on the day of the fatal fall. Third, this letter acts as a transmittal letter enclosing your copy of a renewed application to the Hearing Officer to allow Bluegrass to depose Mr. Gray, or in the alternative, to allow Bluegrass to serve interrogatories and document requests on your client. The rationale for Mr. Gray's deposition or the need to have your client answer interrogatories is set forth in the application itself.

As is typical in the tower industry,<sup>1</sup> Bluegrass does not construct its towers and does not perform its own maintenance on its towers, including the tower at issue in this matter located in Central City, Kentucky. Bluegrass engages the services of several tower construction and/or tower maintenance firms who are experts in this type of work to construct and/or regularly inspect its towers for safety and structural issues, and to correct issues as they are identified. These same companies also install and/or replace transmission equipment on the towers when asked to do so by Bluegrass. In this matter, Bluegrass engaged the services of Tower Services, Inc. to install new cellular transmitting equipment on the tower located in Central City (the "Site").

<sup>1</sup> The tower industry includes not only towers on which cellular communication equipment are located, but also other communication towers.

From the outset of this case, it has been clear that as an owner, Bluegrass does not have a duty to oversee the safety of independent contractor employees working at its cellular sites or on its towers. Your client has admitted that Bluegrass does not have OSHA liability in this matter as only an owner in its response to Bluegrass' Request for Admission No. 10. After a thorough review of opinions involving owners' duties in similar situations, Bluegrass is convinced that only by exerting *actual* control over the work of an independent contractor could an owner ever have any duty to oversee the safety of a contractor's employees. Bluegrass has never exerted actual control over the work of an independent contractor doing construction work at *any* of its towers. However, we understand, at least in theory, how Mr. Gray's understanding of Daniel Combs' job duties at Bluegrass cellular sites could have, prior to Mr. Combs' interview with you, Mr. Gray and Mr. Howard, led to the conclusion, although without merit, that Bluegrass had exerted some level of control over construction activities at its cellular sites.

During the interview mentioned above, Mr. Combs made it clear that the "fifty percent" statements in Mr. Gray's narrative were evidently based on either an incorrect understanding of what Mr. Combs' job duties entail, or on Mr. Combs' inability to clearly describe his job duties during the interview that took place in the highly charged atmosphere at the Site the same day the fatal fall occurred. Mr. Combs stated that he is a Manager of Wireless Field Operations at Bluegrass, consistent with the description shown on his "Position Questionnaire" ("PQ"). He visits cellular sites for two reasons: (1) Mr. Combs has been tasked by his employer to do an annual audit of approximately one hundred (100) cellular sites belonging to Bluegrass; and (2) Mr. Combs sometimes visits a cellular site to verify that tower upgrade work has been properly completed so that he can have his technicians complete equipment installation activities in the equipment shelters.<sup>2</sup> Because of the amount of time he spends in the Bluegrass headquarters office, Mr. Combs, as he related in his interview, finds it difficult to allocate enough time to complete his approximate one hundred audits per year. Mr. Combs is lucky, according to the information supplied during his interview, to make it out to one or two sites for audit activities during the course of a week.

Especially in the first instance mentioned above, there are times, though rare, that a tower crew may be on site when Mr. Combs performs his annual audit. However, Mr. Combs *never* attempts to, and in fact never controls, any ongoing construction activities being conducted by the tower crew. That is not Mr. Combs' job, and he is neither trained nor qualified to direct or oversee tower construction and/or maintenance activities.

While Tower Services was at the Site, as is typical with the way its business operates, no employee of Bluegrass Cellular was on site. Bluegrass did not direct Tower Services in the manner in which Tower Services performed its work, and Bluegrass did not provide Tower Services with any instructions on how to perform the construction activities required in order to accomplish the tasks for which Tower Services was engaged. There can be no doubt that

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<sup>2</sup> To put the frequency of these post-construction visits in perspective, Mr. Combs has not visited a cellular site during calendar year 2007 for this purpose. Typically, Bluegrass is able to determine from close-out documents or other notifications Bluegrass receives from its tower servicing companies that tower upgrade work has been completed properly.

Bluegrass Cellular did not control construction activities prior to or on the day of the fatal fall at the Site.

During his interview, the only thing Mr. Combs could think of that might have led to a misunderstanding of his job duties was that he recalled talking to Mr. Gray about working on projects maybe fifty percent of the time. However, as Mr. Combs clarified during the interview, these projects that may take up to fifty percent of his time are various projects Mr. Combs works on while at the Bluegrass Cellular office.<sup>3</sup> The projects Mr. Combs mentioned have nothing to do with actual construction activities at the towers. We have attached a sworn affidavit executed by Mr. Combs that confirms his duties and the fact that he does not spend anywhere near fifty percent of his time at Bluegrass Cellular's towers, and *never* controls any construction work being carried on by any tower service crew. We have also attached a sworn affidavit executed by Mr. Combs' immediate supervisor, Scott McCloud, that further explains Bluegrass Cellular's role vis-à-vis its cellular sites. If this matter goes to a hearing, Bluegrass expects to introduce testimony that will confirm Bluegrass does not control Tower Services' work at Bluegrass towers. This testimony will likely be offered by Mr. Combs, by Mr. McCloud and by the owners of Tower Services and several of the Tower Services' employees who were at the Site at the time of the fatal fall.

During our many conversations, you have mentioned that you believe there are two other situations that allegedly placed a duty on Bluegrass to oversee safety of independent contractors' employees while they work on towers belonging to Bluegrass. First, you believe that the mere fact Bluegrass had in its possession a Tower Services' Safety Manual should provide the basis for OSHA liability to attach to Bluegrass. We have identified no statute, regulation or opinion anywhere to support this conclusion. This theory of liability is totally without merit. And, the alleged fact that Bluegrass did not follow up on certain safety practices Tower Services stated in its Safety Manual it would perform does not change the outcome: possession of the Tower Services' Safety Manual does *not* provide the basis for any OSHA liability attaching to Bluegrass. If this matter goes to a hearing, Bluegrass intends at this time to elicit testimony from a nationally known tower climbing instructor who has extensive knowledge relating to industry practices as to engagement of tower servicing companies by tower owners and as to the industry practices concerning safety manuals as well as OSHA compliance issues relating to tower owners.

The second item you have mentioned that allegedly places a duty on Bluegrass to oversee safety of independent contractors' employees while they work on Bluegrass' towers is Mr. Combs' job description. This is a strained reading of the job description, at best. First, Mr. Combs himself never understood that his job included any type of oversight on or for independent contractors' employees. Mr. McCloud, Mr. Combs' supervisor, likewise never tasked Mr. Combs with responsibility to oversee the safety of any independent contractors'

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<sup>3</sup> Some of the office projects Mr. Combs would normally be involved in include, but are not limited to, site commissioning projects, omni-to-sector conversion projects, preventative maintenance projects, etc. These projects do not require Mr. Combs to travel to cellular sites, but rather require him to engage in planning and other ongoing activities and meetings at the Bluegrass Cellular office.

employees. No one at Bluegrass Cellular believes that Mr. Combs' job description was ever intended to require him to oversee the safety of independent contractors' employees. In addition, if one reads the document as a whole, rather than taking three or four words out of context, it becomes clear that Mr. Combs' job had nothing whatsoever to do with overseeing the safety of independent contractors' employees.

Your client has focused primarily on Section 2, Paragraph 4 in Mr. Combs' "Position Questionnaire" ("PQ") titled "Safety." This paragraph states that it is Mr. Combs' responsibility to "[m]aintain a proactive safety atmosphere that protects personnel and company assets." This simple statement does *not* say that Mr. Combs has a responsibility to do anything as it relates to independent contractors' employees as they work on Bluegrass towers. This paragraph must be read as part of the entire PQ. The "Basic Purpose" paragraph states that Mr. Combs is to "[h]ire, supervise and train qualified Cellular Technicians, Network Field Engineers, and Senior Network Field Engineers needed to maintain the in-service cell site equipment and all ancillary equipment to meet customer expectations as well as company operational and cost standards." The Basic Purpose has nothing to do with safety oversight of independent contractors' employees. The rest of the PQ after the "Basic Purpose" section explains the methodology needed to make certain the Basic Purpose of Mr. Combs' employment is met, as is explained in "Principal Accountabilities." This section of the PQ, including Paragraph 4, cannot add to the "Basic Purpose," but only explains how the Basic Purpose is to be achieved. Paragraph 4, taken out of context, does not give Bluegrass or its employees, including Mr. Combs, any control, let alone *actual* control, over independent contractors' employees or the safety of those employees, and does not provide the basis for any OSHA liability attaching to Bluegrass.

As mentioned above, Bluegrass can understand how at the outset the Commission could have construed the evidence as providing the basis for the citations to have been issued. However, Bluegrass believes that, had Mr. Gray understood that Mr. Combs does not spend and never has spent fifty percent of his time at any Bluegrass cellular sites, and was not at the Site the day of the accident until *after* the accident occurred, there would have been no basis for issuing the citations or for filing the complaint. Based on legal procedure, we agree. We do not believe that, as an attorney in Kentucky practicing under Rule 11, you would have been justified in filing the complaint in this matter had Mr. Gray properly understood Mr. Combs' job and how it was performed.

As you know from the information furnished by Mr. Combs during his interview and as contained in his and Mr. McCloud's sworn affidavits attached hereto, no actual control was ever exerted by Bluegrass over the construction activities of its independent contractors working on Bluegrass towers, and the other two issues you have mentioned, *i.e.*, the possession of the Safety Manual and Mr. Combs' PQ, could not possibly be the basis for any law of which we are aware to be extended, modified or reversed such that OSHA liability would attach to Bluegrass. Thus, we again urge you to dismiss the complaint and urge KOSH to withdraw its citations.

In a letter to you dated September 14, 2007, we asked for copies of all the interview tapes from Mr. Gray's interviews the day of the fatal fall with Tower Services' employees. We have not received a formal reply to that request, so we take this opportunity to renew our request.

Kembra Sexton Taylor, Esq.

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Having access to all the facts in this case is the only way we can properly defend our client's interests, and we believe there is information in the recorded interviews that will be helpful to our client's defense. We remind you that we are already aware of the identity of each of the interviewees, and since they are not employees of Bluegrass Cellular, no retaliatory action can be taken against them by Bluegrass. We are willing to enter into a protective order with you so that the interviews will remain confidential.

Finally, we enclose herewith a Renewed Application to Serve Interrogatories and Document Requests on your client or, in the alternative, to depose Mr. Gray. Your client has claimed that Bluegrass took actions consistent with those of a "controlling employer," a "host employer" and a "controlling contractor." Bluegrass has the right and the need to know what actions it allegedly took that your client believes were consistent with these three OSHA characterizations.

We look forward to your prompt dismissal of this matter, or to your prompt attention to our other requests.

Yours very truly,

A handwritten signature in black ink, appearing to read "Steve N. Siegel", with a stylized flourish at the end.

Steve N. Siegel

cc: John E. Selent, Esq. (w/enclosures)  
Scott McCloud (w/enclosures)